143 (3)

No. 09-341

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

ANTHONY D'ARIA,

*Petitioner,*

v.

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, DAVID BACHRACH, individually and on behalf of all others similarly situated,

*Plaintiffs-Respondents,*

-and-

UBS FINANCIAL SERVICES, INC., a corporation, UBS PAINE WEBBER, a corporation, PAINE WEBBER GROUP, INC., a corporation,

*Defendants-Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## REPLY BRIEF

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Respondent UBS fails to contest the reasons advanced by Petitioner Anthony D'Aria in support of his petition for certiorari. Instead, UBS asserts two procedural barriers to review that are without merit.

First, contrary to UBS's argument, D'Aria does not seek an advisory opinion. D'Aria's petition seeks to overturn the entire proposed settlement. The question posed is whether the proposed settlement's reversionary fee structure, which has been condemned by legal scholars as a *per se* breach of class counsel's ethical and fiduciary duties to the class, demonstrates both that absent class members were inadequately represented and that the proposed settlement is unfair and inadequate under Rule 23. Contrary to UBS's misguided argument, the question is not where the money would go if the attorneys' fees were slashed.

Second, D'Aria's procedural standing to challenge the proposed settlement comes into question solely because of a perfunctory and inaccurate timeliness analysis in the courts below which ignored blatant manipulation of the settlement approval process by UBS (which UBS attempts to obscure with unsworn and unattributed facts absent from the record below). In the settlement approval process under Rule 23, courts have a fiduciary obligation to safeguard the interests of absent class members. If there is merit in D'Aria's contention that the proposed settlement inherently violates the due process rights of absent class members, then by definition, the courts below failed adequately to protect absent class members' interests when they allowed highly artificial timeliness considerations to deprive D'Aria of procedural status to challenge the settlement.

## I. D'Aria Challenges the Entire Proposed Settlement on the Basis of Its Reversionary Fee Structure, Not Merely the Structure's Effect if Attorneys' Fees Were Reduced.

UBS is disingenuous in suggesting that D'Aria seeks an "advisory opinion" on the attorney's fee provision which will not affect the rights of the litigants. The gravamen of D'Aria's petition is that the proposed settlement's reversionary fee structure poisons the entire settlement:

> [A] class action settlement shaped by the ethical conflicts, perverse incentives and procedural distortions of a reversionary fee structure *ipso facto* is not "fair, reasonable and adequate" under Rule 23(e)(2) and should not be approved. . . . [A] reversionary fee structure [also] renders adequate representation under Rule 23(a)(4) impossible, and poses an insurmountable obstacle to settlement-only class certification antecedent to settlement approval.

Pet. Br. 11.

A reversionary fee structure causes *immediate* harm to absent class members' interests, *i.e.*, inadequate representation, and an unfair and inadequate settlement. The damaging consequences of the structure that D'Aria identifies had their effect on the proposed settlement long before the district court was ever called on to consider the proposed attorney's fees. The proposed settlement was shaped by the breaches of class counsel's duties that arise from

payment by an adversary (Pet. Br. 12-13), and by multiple perverse incentives and opportunities to trade class interests for the interests of the plaintiff's counsel and defendants who negotiated it (Pet. Br. 14-16); simply by adopting the reversionary fee structure, class counsel imposed an unjustifiable economic loss on the class (Pet. Br. 16-17); and both objection and judicial review for the benefit of absent class members were inhibited during the settlement approval process (Pet. Br. 17-19)—all irrespective of whether the district court ever actually invoked the reversionary fee provision (indeed, the district court was predictably dissuaded from doing so). Thus, the effects of the reversionary fee structure identified by D'Aria do not concern "a hypothetical state of facts," *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937) as UBS contends, but are concrete reasons to reject the proposed settlement in its entirety.

For the same reasons, UBS's strained analogy of D'Aria's claims to a non-justiciable "subjective chill" of First Amendment rights, *Laird v. Tatum*, 408 U.S. 1 (1972), is inapposite. No credence should be given UBS's unstated implication that the settlement's structural features challenged by D'Aria are a mere technicality in a proposed settlement that otherwise deserves approval. While D'Aria's petition focuses on the reversionary fee structure because it is the central legal issue raised by the settlement, his wider argument in the courts below identified numerous other, concrete and troubling features of the settlement which are closely related to the conflicts and perverse incentives associated with a reversionary fee structure. Thus, D'Aria alleged in the courts below that:

— The proposed settlement followed a *de minimus* investigation by counsel and 16-page boilerplate complaint, with no adversarial motion practice, discovery, or litigation whatsoever. Class counsel reached a "quickie" settlement in less than four months before UBS even answered any of the underlying complaints that were consolidated solely for purposes of settlement.

— The action's history, intertwined with the settlement of an earlier, related California case, *Bowman v. UBS Financial Services*, Case No. C-04-03525 MMC, suggested a nationwide (ex-California) settlement was collusively pre-packaged without any intention of adversarial litigation.

— Class counsel relied on UBS's data and expert analysis of damages without expert assistance for the class, and settled for what D'Aria calculated (in the only written estimate ever provided to the court) to be 4 or 5 cents on the dollar of claimed losses.

— The legal fees of $11,250,000 for plaintiff's counsel were exorbitant in relation to the negligible prosecution of the action; the district court speculated that the fees represented a lodestar multiplier of at least ten, and the parties did not contradict D'Aria's estimate that the multiplier was over forty.

— The notice to class members failed adequately to disclose the settlement's reversionary structure, both as to legal fees and as to the overall value of the settlement to class members.

*Cf.* Pet. Br. 7-8.

## II. If There Is Merit in D'Aria's Argument that the Proposed Settlement's Reversionary Fee Structure Inherently Violates the Rights of Absent Class Members, Then the Courts Below Necessarily Erred When They Failed to Grant D'Aria Status as Either an Objector or an Intervenor.

1. Starting months before the final approval hearing on the proposed settlement, D'Aria made several applications to challenge the settlement as both an objector and as an intervenor-plaintiff. Either status provides standing to appeal the proposed settlement. The district court and the court of appeals, however, failed to admit D'Aria as either an objector or an intervenor, and thereby avoided any consideration of the merits of his contentions on procedural grounds.

Both with respect to objection and intervention, the procedural barriers erected against D'Aria in the courts below rest on a wholly artificial calculation of his timeliness, as explained below. If D'Aria's contentions concerning the interests of absent class members have any merit, it also follows that the district court abused its discretion (and the Ninth Circuit erred in affirming) when it allowed such a timeliness analysis to deprive

him of any status to challenge the settlement on absent class members' behalf. The rights of absent class members are a principal concern of the settlement approval process established by Rule 23(e), and courts have a fiduciary obligation to safeguard them. *See* Pet. Br. 10-11 (citing cases). The participation of both objectors and intervenors is favored in the settlement approval process because their presence adds an adversarial voice concerning the proposed settlement that serves this purpose. *See, e.g., Vollmer v. Selden*, 530 F.3d 656, 660 (7th Cir. 2003) (intervenors counter-act collusive incentives at settlement stage), *In re General Motors Corp.*, 55 F.3d 768, 803 (3rd Cir. 1995) (objectors valued to provide independently-derived information about settlement merits).

In practical terms, the procedural timeliness issue raised by UBS is ancillary to the merits of D'Aria's substantive challenge to the settlement and certainly does not stand in the way of this Court granting certiorari.

2. A summary timeline of the events concerning D'Aria's timeliness that are discussed below is as follows:

September 22, 2006:

> Lawrence Kaufmann, represented by Lovell Stewart Halebian LLP ("LSH"), counsel to D'Aria here, submits an objection in the related case, *Bowman v. UBS Financial Services*, in which he announces his intention to file a parallel objection in the instant action.

Late September 2006:

UBS contacts Kaufmann behind the back of LSH about withdrawing his *Bowman* objection in exchange for forgiveness of a $102,000 debt to UBS.[1]

October 13, 2006:

Kaufmann files motions through LSH to intervene in both actions.

November 7, 2006:

UBS and Kaufmann secretly reach a formal agreement for Kaufmann's withdrawal from both actions in exchange for forgiveness of his $102,000 debt.

November 14, 2006:

The deadline to file objections in the instant *Glass* action. UBS files notice late in the evening disclosing Kaufmann's withdrawal from both actions (Reply App. B).

November 16, 2006:

More than two months before the final approval hearing in the instant action, D'Aria, represented by Kaufmann's former class action counsel LSH, applies to substitute for Kaufmann as objector and proposed intervenor-plaintiff (Resp. App. D). The district court denies his application the same day before even receiving a response from UBS or class counsel (Pet. App. D).

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1. *See* Reply App. A, ¶2. The district court, however, sustained a hearsay objection by UBS to this evidence. Resp. App. 6a, fn.

December 1, 2006:

D'Aria files a brief urging the court to preserve Kaufmann's objections in the instant action until D'Aria is able to reassert them.

December 15, 2006:

More than a month prior to the final approval hearing, D'Aria files his own motion to intervene in the instant action.

January 17, 2007:

The district court strikes D'Aria's brief on Kaufmann's objections and permits Kaufmann to withdraw them (Resp. App. A). The court simultaneously denies D'Aria's motion to intervene (Pet. App. C).

January 19, 2007:

Final approval hearing on the proposed settlement.

*Cf.* Pet. Br. 8, Resp. Br. 3-4.

3. D'Aria originally applied to substitute for objector and proposed intervenor Kaufmann on the morning of November 16, 2006, instead of on November 14—the deadline to object, when UBS first disclosed Kaufmann's withdrawal from the litigation. No practical difficulties whatsoever were posed by the timing of D'Aria's application. D'Aria sought to pursue arguments against the proposed settlement that had already been fully and timely asserted and briefed during the preceding months (by the same counsel) on behalf of Kaufmann. Moreover, D'Aria's application came more

than two months before the final approval hearing on the proposed settlement, scheduled for January 19, 2007.

D'Aria's purported untimeliness results solely from UBS's belated disclosure of Kaufmann's withdrawal on the very evening of the deadline to object. Given the swiftness of D'Aria's initial application to substitute for Kaufmann after that disclosure, there is no doubt that if Kaufmann's withdrawal had been disclosed even a single day earlier, D'Aria would have met the deadline and been able to challenge the proposed settlement (at the very least as an objector) without procedural difficulty. These circumstances strongly suggest that UBS exploited its private leverage against Kaufmann not merely to induce him to withdraw, but also to hide his abandonment of class interests from his own class action counsel while UBS strategically timed his exit to hinder entry of any substitute to speak on behalf of absent class members, such as D'Aria. Kaufmann never disclosed to his own class action counsel that he was negotiating with UBS to sell out class interests for private gain, even after he and UBS reached a formal agreement on November 7, 2006.[2] Apart from being rife with probable legal and ethical impropriety,[3] such a

2. The papers disclosing Kaufmann's withdrawal were filed by UBS, an adverse party. UBS's contrary statement (at Resp. Br. 4) that "*Kaufmann* filed notice of the settlement in the district court and asked the court to withdraw" (emph. added) is false. *See* Reply App. B.

3. D'Aria argued that UBS's deal with Kaufmann amounted under New Jersey law to commercial bribery of Kaufmann to breach his fiduciary duty to class members as a proposed class representative. Resp. App. 17a.

stratagem by UBS directly undermines the process established by Rule 23 to protect absent class members.

As it did in the Ninth Circuit, UBS presents to this Court unsworn and unattributed statements that were never presented to the district court, suggesting that Kaufmann initiated his withdrawal from the litigation.[4] *See* Resp. Br. 3. To the contrary, sworn testimony from Kaufmann's co-counsel in the class action indicated that UBS contacted Kaufmann days after he filed his initial objection in the related case in September, 2006.[5] Reply App. A, ¶2. The bare-bones information that UBS made available to the court (nearly identical declarations by Kaufmann and the attorneys who negotiated his private settlement with UBS, attached to UBS's notice disclosing his withdrawal) artfully omit to state when negotiations of his withdrawal began, reciting only that an agreement was reached on November 7, 2006. Reply App. B. The record on appeal remains effectively incomplete because the district court failed to press UBS for any further clarification of these events.

4. UBS implausibly argues that Kaufmann's withdrawal has no bearing on determining whether

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4. Specifically, nothing in the record below supports UBS's statements that "UBS had been preparing to sue Lawrence Kaufmann [and] Kaufmann, in turn, was preparing a cross-complaint alleging (among other things) wrongful discharge," or that "Kaufmann's counsel, George Mahr III, then approached UBS. . . ." Resp. Br. 3; *cf.* Reply Apps. A and B (the information actually available to the district court).

5. The court sustained UBS's objection to this evidence as hearsay. Resp. App. 6a, fn.

D'Aria's motions to substitute for Kaufmann and to intervene were timely. Resp. Br. 9; *cf.* Pet. App. 65a-66a (district court holding that D'Aria failed to show reliance on Kaufmann). Long before D'Aria came forward to adopt Kaufmann's objections to the proposed settlement as his own, however, D'Aria was not only aware of the objections, but actually provided assistance and information to Kaufmann's class action counsel to prosecute them during September and October 2006 when they were being formulated and briefed to the court. Resp. App. 8a (D'Aria declaration).

D'Aria's obligation to move for intervention is properly measured not from when he learned merely that his interests were at stake in the litigation, but from when he learned that his interests were no longer represented by the existing parties to the litigation. *San Jose Mercury News, Inc. v. U.S. Dist. Court - Northern Dist. (San Jose)*, 187 F.3d 1096, 1101 (9th Cir. 1999) (In measuring delay in seeking intervention, the inquiry looks to when the intervenor became aware its interests would no longer be adequately protected by the parties). As a proposed intervenor and class representative, Kaufmann expressly sought to represent other absent class members—surely not least among them D'Aria, who personally assisted Kaufmann's motions and objections. Moreover, as an objector, Kaufmann was a party to the action. *Devlin v. Scardelletti*, 536 U.S. 1 (2002). Hence, there was no reason, and no legal requirement, why D'Aria himself needed to duplicate Kaufmann's objections and motions. D'Aria only learned Kaufmann had traded the interests of other absent class members for a private deal when UBS disclosed Kaufmann's withdrawal, whereupon D'Aria immediately—and timely—acted to take up Kaufmann's

abandoned role. The district court thus clearly erred in denying intervention on timeliness grounds.

5. For similar reasons, assuming that DAria's contentions are meritorious, he should also have been granted the status of an objector. In the class action settlement approval process, courts may and regularly do consider the merits of procedurally defective objections. *See, e.g., In re Worldcom*, 2005 WL 2319118 at *1 fn.3, *13 fn.23 (S.D.N.Y. 2005) (two late objections addressed); *In re Global Crossing Secs. & ERISA Litig.*, 225 F.R.D. 436, 457 fn.10 (S.D.N.Y. 2004) (six late objections considered without deciding whether untimeliness excusable). It was an abuse of discretion for a court with a fiduciary duty to absent class members to disregard a meritorious objection when the objection was in practice presented in good time, and the procedural defect was entirely due to a deliberate stratagem of the defendants.

UBS notes that D'Aria also submitted a consent to join the action, Resp. Br. 3 and 9, but this has no bearing on his right to object to (or intervene in) the proposed settlement. Unlike a Rule 23 class action from which class members have the right to "opt out", the collective action procedure established by the Fair Labor Standards Act, 29 U.S.C. § 216, requires participants to affirmatively "opt in". In the settlement context, therefore, a form of consent to join the collective action serves a similar purpose as a claim form in a conventional class action. Indeed, the settlement notice sent to class members in this action (which is both a collective action and a Rule 23 class action) expressly contemplates that objectors may also submit consents to join in order to assure their participation in the final settlement. *See* Reply App. C (excerpt of settlement notice).

## CONCLUSION

For the foregoing reasons, D'Aria's petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — DECLARATION OF KENNETH K. LEHN DATED DECEMBER 15, 2006

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. C-06-04068 MMC

JOSEPH GLASS, et al.,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. et al.,

Defendants.

**DECLARATION OF KENNETH K. LEHN IN SUPPORT OF ANTHONY D'ARIA'S MOTION TO INTERVENE**

*Appendix A*

Date: January 19, 2007
Time: 9:00 a.m.
Ctrm: 7
Judge: Hon. Maxine M. Chesney

I, Kenneth K. Lehn, declare as follows:

1. I am an attorney licensed to practice in the State of New Jersey and a principal in the law firm of Winne, Banta, Hetherington, Basralian & Kahn, P.C., located in Hackensack, New Jersey. I am counsel to Lawrence R. Kaufmann concerning wage and hour actions against his former employers. Except where otherwise indicated, I have personal knowledge of the facts stated in this declaration, and if called upon to do so could and would competently testify to them.

2. In a telephone conversation on November 15, 2006, Mr. Kaufmann told me that UBS had contacted other counsel he retained in New Jersey (Mahr and Mahr, L.L.C.) about Mr. Kaufmann's indebtedness of $102,000 to UBS within days after his litigation counsel, Lovell Stewart Halebian LLP, filed Mr. Kaufmann's objections to the proposed settlement in *Bowman et al. v. UBS Financial Services, Inc.*, Case No. C-04-03525 MMC (*Bowman* docket no. 81).

3. On earlier occasions in October and November, 2006, when Mr. Kaufmann and I discussed issues regarding both the *Bowman* and *Glass* actions against UBS and other claims by him against other brokerage firms, he never disclosed to me that he was secretly

negotiating with or had reached a deal with UBS to withdraw his objections and motions in *Bowman* and in *Glass*.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this Declaration was executed at East Orange, New Jersey, on December 15, 2006.

/s/
KENNETH K. LEHN

*Signature attestation*: I hereby attest that I have on file the holograph signature for the conformed signature indicated above by /s/ in this e-filed document.

/s/
JOHN HALEBIAN

## APPENDIX B — NOTICE OF LAWRENCE R. KAUFMANN'S WITHDRAWN: (1) OBJECTION TO PROPOSED SETTLEMENT AND INTENTION TO APPEAR AT SETTLEMENT HEARING; AND (2) MOTIONS TO INTERVENE, FOR CONSOLIDATION, AND FOR OTHER RELIEF DATED NOVEMBER 14, 2006

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UBS FINANCIAL SERVICES INC.

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF CALIFORNIA**

CASE NO. C-04-03525 MMC

JEFF BOWMAN AND LAUROS REYES aka LARRY REYES, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. and DOES 1 through 50, inclusive,

Defendants.

*Appendix B*

CASE NO. C-06-04068 MMC

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, AND DAVID BACHRACH, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. and DOES 1 through 50, inclusive,

Defendants.

**NOTICE OF LAWRENCE R. KAUFMANN'S WITHDRAWN: (1) OBJECTION TO PROPOSED SETTLEMENT AND INTENTION TO APPEAR AT SETTLEMENT HEARING; AND (2) MOTIONS TO INTERVENE, FOR CONSOLIDATION, AND FOR OTHER RELIEF**

| | |
|---|---|
| Date: | November 17, 2006 |
| Time: | 9:00 a.m. |
| Courtroom: | 7 |
| Judge: | Hon. Maxine M. Chesney |

TO THE COURT AND ALL INTERESTED PARTIES:

*Appendix B*

PLEASE TAKE NOTICE THAT Lawrence R. Kaufmann ("Kaufmann") has withdrawn (1) his "Objection to the Proposed Settlement and Intention to Appear at the Settlement Hearing" in *Bowman v. UBS Financial Services, Inc. ("Bowman")* (C-04-03525 MMC) (Docket No. 81) and (2) his "Motion to Intervene, For Consolidation And For Other Relief" (Docket No. 83) in *Bowman* (Docket No. 83) and in *Glass v. UBS Financial Services, Inc.* ("*Glass*") (C-06-04068 MMC) (Docket No. 37) that he previously filed before this Court. The circumstances surrounding Kaufmann's withdrawal of such motions are provided in the attached documents (marked Exhibits A through C): (1) Letter from Kaufmann's attorney, George L. Mahr III, notifying the Court that Kaufmann has withdrawn these motions, (2) Kaufmann Declaration, and (3) Declaration of Vincent P. Browne.

DATED: November 14, 2006

PAUL, HASTINGS, JANOFSKY & WALKER LLP

By: /s/
M. KIRBY C. WILCOX

Attorneys for Defendant
UBS FINANCIAL SERVICES INC.

*Appendix B*

**EXHIBIT A**

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CONCENTRATE PRACTICE IN
SECURITIES ARBITRATION & LITIGATION
AND CORPORATE LITIGATION

November 13, 2006

*VIA UPS NEXT DAY DELIVERY*

Judge Maxine Chesney
United States District Court
Northern District of California
450 Golden Gate Avenue, Dept. 7
San Francisco, CA 94102

Re: Notice of Withdrawn (1) "Objection of Lawrence R. Kaufmann to Proposed Settlement and Notice of Intention to Appear at Settlement Hearing" in *Bowman v. UBS Financial Services, Inc.* ("*Bowman*") (C-04-03525 MMC) and (2) "Motion to Intervene, for Consolidation and for Other Relief" in *Bowman* and *Glass v. UBS Financial Services, Inc.* ("*Glass*") (C-06-04068 MMC)

*Appendix B*

Dear Judge Chesney:

Please be advised that I represent Lawrence R. Kaufmann, a former employee of UBS Financial Services, Inc. I write to you to notify you of my client's decision to *with* the following:

(1) His "Objection of Lawrence R. Kaufmann to Proposed Settlement and Notice of Intention to Appear at Settlement Hearing" (Docket No. 81) in *Bowman* and

(2) His "Motion to Intervene, for Consolidation and for Other Relief" in *Bowman* (Docket No. 83) and *Glass* (Docket No. 37) that he previously filed before this Court.

In summary, on December 13, 2001, UBS Financial Services Inc., ("UBSFS") loaned Mr. Kaufmann a significant sum of money, which UBSFS agreed to forgive over a number of years of services performed by Mr. Kaufmann. His employment ended before the lapse of that time period. UBSFS has demanded repayment of the balance of this loan.

In settlement of their differences, Mr. Kaufmann proposed, through me, that if UBSFS forgave the entire outstanding loan balance, Mr. Kaufmann would agree to the following:

*Appendix B*

1. To withdraw with prejudice his "Objection of Lawrence R. Kaufmann to Proposed Settlement and Notice of Intention to Appear at Settlement Hearing" filed on September 21, 2006 in *Bowman*;

2. To withdraw with prejudice his "Motion to Intervene, for Consolidation and for Other Relief' filed on October 13, 2006 in *Bowman* and *Glass;*

3. To file no other objections to the proposed *Bowman* Settlement and to file no objections to the proposed *Glass* Settlement;

4. Not to appear (either personally or through counsel) at the final approval hearing for the proposed *Bowman* Settlement on November 17, 2006, or for the proposed *Glass* Settlement on January 19, 2007, or an any other dates that the Court may schedule for such hearings;

5. Not to appeal the final settlements in *Bowman* or *Glass;* and

6. To file a notice of claim in *Glass* and not to opt out.

On November 7, 2006, UBSFS and Mr. Kaufmann reached a formal Settlement Agreement which included all of the above terms. I represented Mr. Kaufmann throughout the negotiations of this Agreement and the above facts are also set forth in Mr. Kaufmann's **enclosed** Declaration.

Therefore, please be advised that Mr. Kaufmann hereby withdraws with prejudice his "Objection of Lawrence R. Kaufmann to Proposed Settlement and Notice of Intention to Appear at Settlement Hearing" filed on September 21, 2006 in *Bowman*. Mr. Kaufmann further withdraws with prejudice his "Motion to Intervene, for Consolidation and for Other Relief' filed on October 13, 2006 in *Bowman* and *Glass*.

Thank you for your consideration of this matter. Should you have any questions with regard to this matter as it relates to Mr. Kaufman, kindly contact me.

Respectfully submitted,

MAHR and MAHR, LLC
Attorneys for Lawrence R. Kaufmann

s/ George L. Mahr, III

*Appendix B*

By: George L. Mahr, III

**EXHIBIT B**

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF CALIFORNIA**

CASE NO. C-04-03525 MMC

JEFF BOWMAN AND LAUROS REYES aka LARRY REYES, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. and DOES 1 through 50, inclusive,

Defendants.

CASE NO. C-06-04068 MMC

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*Appendix B*

Defendants.

**DECLARATION OF LAWRENCE R. KAUFMANN REGARDING HIS WITHDRAWN: (1) OBJECTION TO PROPOSED SETTLEMENT AND INTENTION TO APPEAR AT SETTLEMENT HEARING; AND (2) MOTIONS TO INTERVENE, FOR CONSOLIDATION, AND FOR OTHER RELIEF**

I, Lawrence R. Kaufmann, declare:

1. If called as a witness, I would and could competently testify to all facts within my personal knowledge except where stated upon information and belief.

2. On December 13, 2001, UBSFS loaned me a significant sum that UBSFS agreed to forgive over a period of years of service. I executed a Promissory Note in favor of UBSFS for this loan.

3. My employment with UBSFS terminated before the lapse of the forgiveness period, and in August of 2003 and again in July of 2004 UBSFS made a demand for repayment of the balance, plus interest.

4. In compromise of the demand for repayment, I, through my attorney George L. Mahr III, proposed to UBSFS that, if it forgave the outstanding balance, I, among other things, would:

- Withdraw with prejudice the "Objection Of Lawrence R. Kaufmann to Proposed Settlement and Notice of Intention to Appear at Settlement Hearing" filed on September 21, 2006 in

*Bowman*;

- Withdraw with prejudice the "Motion to Intervene, for Consolidation and for Other Relief" filed on October 13, 2006 in *Bowman* and *Glass;*

- Not file any other objections to the Proposed *Bowman* Settlement or to file an objection to the Proposed *Glass* Settlement;

- Not appear (either personally of through counsel) at the final approval hearing for the Proposed *Bowman* Settlement on November 17, 2006 or for the Proposed *Glass* Settlement on January 19, 2007, or on any other dates that the Court may schedule for such hearings;

- Not appeal the final settlements in *Bowman* or *Glass;* and

- File a notice of claim in *Glass* and to not opt out.

5. On November 7, 2006, UBSFS and I reached a Settlement Agreement which included these terms, among others.

6. I hired my attorney, George L. Mahr III to represent me in resolving this matter. Mr. Mahr dealt exclusively with UBSFS to negotiate this agreement on my behalf and carried out my wishes. I did not directly

negotiate with UBSFS.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 10, 2006 at Madison, N.J.

/s/ Lawrence R. Kaufmann
Lawrence R. Kaufmann

*Appendix B*

**EXHIBIT C**

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Attorneys for Defendant
UBS FINANCIAL SERVICES INC.

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF CALIFORNIA**

CASE NO. C-04-03525 MMC

JEFF BOWMAN AND LAUROS REYES aka LARRY REYES, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. and DOES 1 through 50, inclusive,

Defendants.

CASE NO. C-06-04068 MMC

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, AND DAVID BACHRACH, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES, INC. and DOES 1 through 50, inclusive,

Defendants.

**DECLARATION OF VINCENT P. BROWNE REGARDING LAWRENCE R. KAUFMANN'S WITHDRAWN: (1) OBJECTION TO PROPOSED SETTLEMENT AND INTENTION TO APPEAR AT SETTLEMENT HEARING; AND (2) MOTIONS TO INTERVENE, FOR CONSOLIDATION, AND FOR OTHER RELIEF**

I, Vincent P. Browne, declare:

1. I am an attorney at law licensed to practice before the Courts of the State of New Jersey. I am currently Executive Director and Deputy General Counsel for UBS Financial Services Inc. ("UBSFS"). If called as a witness, I would and could competently testify to all facts within my personal knowledge except where stated upon

information and belief.

2. On December 13, 2001, UBSFS loaned Lawrence R. Kaufmann ("Kaufman") a significant sum that UBSFS agreed to forgive over a period of years of service. Kaufmann executed a Promissory in favor of UBSFS for this loan.

3. Kaufmann's employment with UBSFS terminated before the lapse of the forgiveness period, and in August of 2003 and again in July of 2004 UBSFS made a demand for repayment of the balance, plus interest.

4. In compromise of the demand for repayment, Kaufmann, through his attorney George L. Mahr III, proposed to UBSFS that, if it forgave the outstanding balance, he would:

- Withdraw with prejudice the "Objection Of Lawrence R. Kaufmann to Proposed Settlement and Notice of Intention to Appear at Settlement Hearing" filed on September 21, 2006 in *Bowman*;

- Withdraw with prejudice the "Motion to Intervene, for Consolidation and for Other Relief" filed on October 13, 2006 in *Bowman* and *Glass*;

- Not file any other objections to the Proposed *Bowman* Settlement or to file an objection to the

*Appendix B*

Proposed *Glass* Settlement;

- Not appear (either personally or through counsel) at the final approval hearing for the Proposed *Bowman* Settlement on November 17, 2006 or for the Proposed *Glass* Settlement on January 19, 2007, or on any other dates that the Court may schedule for such hearings;

- Not appeal the final settlements in *Bowman* or *Glass*; and

- File a notice of claim in *Glass* and to not opt out.

5. On November 7, 2006, UBSFS and Kaufmann reached a Settlement Agreement which included these terms, among others.

6. I dealt exclusively with George L. Mahr III to negotiate this agreement with and never with Mr. Kaufmann. Mr. Mahr assured me that the terms of our settlement were within the scope of his representation of Kaufmann.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 10, 2006 at Weehawken, New Jersey.

/s/ Vincent Browne
Vincent Browne

## APPENDIX C — NOTICE OF PENDENCY OF CLASS ACTION AND OPPORTUNITY TO OPT IN, PROPOSED SETTLEMENT AND HEARING DATE FOR COURT APPROVAL DATED AUGUST 21, 2006

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF CALIFORNIA**

**CASE NO. C-06-4068 MMC**

JOSEPH GLASS, DANTE DIFRANCESCO, RALPH CARBONE, AND DAVID BACHRACH, individually, and on behalf of all others similarly situated,

Plaintiffs,

vs.

UBS FINANCIAL SERVICES INC., and DOES 1 through 50, inclusive,

Defendants.

**NOTICE OF PENDENCY OF CLASS ACTION AND OPPORTUNITY TO OPT IN, PROPOSED SETTLEMENT AND HEARING DATE FOR COURT APPROVAL**

* * *

C. ***Objecting to the Settlement.***

* * *

Any Class Member who does not object to the Settlement in the manner described above will be deemed to have waived any objections and will be

foreclosed from making any objection (whether by appeal or otherwise) to the Settlement. If the Court rejects your objection, you will still be bound by the terms of the Settlement with respect to your non-FLSA claims in all instances, and your FLSA claims if you submit a valid and timely Consent to Join Settlement Form, unless you also submit an Exclusion Form in the manner described in this Notice.

* * * *